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No. 84-1413

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

COCHRANE & BRESNAHAN,
PAN O'GOLD, INC., IMPERIAL PRODUCTS CORP.,
AND JOHN E. KOERNER & CO., INC.,
Petitioners

v.

PLAINTIFF CLASS REPRESENTATIVES,
Respondents

In Re: Corn Derivatives Antitrust Litigation
MDL 414

BRIEF IN OPPOSITION OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

The Petition has been filed on behalf of three plaintiffs in the District Court, and on behalf of a law firm which represented two of those plaintiffs and a class member in the District Court. The underlying litigation is an antitrust class action which was settled in 1983. Those settlements were approved, after briefing and hearing, by the District Court.

In the District Court, the Petitioner law firm represented one plaintiff who supported and accepted the proposed settlement, while simultaneously representing another plaintiff who actively opposed the same settlement. The undersigned Respondents, asserting that this dual position presented a manifest conflict of interest, moved in the Third Circuit to disqualify Petitioners. The Court of Appeals for the Third Circuit granted the Motion to Disqualify, ruling that it would be unfair to permit one of Petitioner law firm's clients to use against another client, information which had been gained during the joint representation.

The question presented for review is as follows:

Did the Court of Appeals in the *Corn Derivatives Antitrust Litigation* act within its broad appellate authority in concluding that Petitioner law firm should be disqualified, where two clients retained Petitioner law firm to file suit, and where, later, that law firm chose to represent one of those clients against the other in the course of the same litigation.

STATEMENT REQUIRED BY RULE 28.1

Respondents are class representatives of the plaintiff class, a class of purchasers of corn derivatives products, and include the following class representatives:

Bear Stewart & Corp.
Bodines, Inc.
Cumberland Farms Dairy, Inc., whose parent is Delaware Food Stores, Inc.
Consolidated Packaging Corp.
Eastern Candy Company, Inc.
Food Foundation, Inc.
Golden Quality Ice Cream Company
G. Heileman Brewing Company, Inc.
Health Care Industries, Inc.
Kalva Corp.
Korbro Oil Corp.
Land O'Lakes, Inc., whose partially owned subsidiaries are Norris Creameries, Inc.; Imperial Packaging, Inc.; Imperial, Inc.; and Lakeside Dairy Company
Plantation Confection Company, Inc.
Virnelson Bakery, Inc.

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v.

PLAINTIFF CLASS REPRESENTATIVES,
Respondents

In Re: Corn Derivatives Antitrust Litigation
MDL 414

BRIEF IN OPPOSITION OF RESPONDENTS

Pursuant to Rule 27.2(b) of the rules of this Court, RESPONDENTS, plaintiff class representatives in the Court below, file this brief in opposition to the Petition for a Writ of Certiorari seeking to overturn a decision of the Court of Appeals for the Third Circuit disqualifying the Petitioner law firm, and respectfully request this Court to deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Petition has been filed on behalf of three plaintiffs in the District Court, and on behalf of a law firm which represented two of those plaintiffs and a class member in the District Court.

In the underlying proceeding, numerous cases, most of which were filed as class actions, were consolidated by the Judicial Panel on Multidistrict Litigation and transferred to the United States District Court in Newark, New Jersey. Each Complaint alleged violations by defendants of the antitrust laws. The actions were resolved by settlements, which settlements were approved by the District Court.

In April, 1983, Petitioner, Cochrane & Bresnahan, stated its opposition on behalf of its clients to the proposed settlements. According to Petitioner, Cochrane & Bresnahan, the firm learned on June 30, 1983, that one of the plaintiffs (Land O' Lakes), and a class member (General Mills), which the Petitioner firm represented, approved the settlements and wanted to participate in those settlements. But not until October, 1983, almost four months later, did Petitioner, Cochrane & Bresnahan, withdraw its representation of the plaintiff supporting the settlements. During this time, however, that firm actively opposed those settlements; settlements in which two of its clients, Land O' Lakes and General Mills, had already expressly stated their wish to participate.

The client supporting the settlement, Land O' Lakes, Inc., joined by other plaintiffs in the Court below, then moved to disqualify Cochrane & Bresnahan who was its counsel, because of the manifest conflict inherent in such joint representation by the Petitioner law firm.

Land O' Lakes, Inc. is also a Respondent in this Court, and is opposing the Petition for Certiorari.

On November 15, 1984, the Court of Appeals for the Third Circuit, granted the Motion to Disqualify the Petitioner law firm, holding that:

> ". . . it would be unfair, appearances apart, to permit [Cochrane & Bresnahan] to use against its former client the information about the strengths and weaknesses of the case gained from the joint representation. Under these circumstances, [Cochrane & Bresnahan] must be disqualified." Pet. App. A at 14a.

The plaintiff class is not now "unrepresented" as a result of the ruling of the Court of Appeals for the Third Circuit. At least twenty other class action complaints were consolidated by the Multidistrict Panel. Counsel in those actions continue to represent the class.

REASONS FOR DENYING THE WRIT

Nothing in the Petition supports the grant of a Writ of Certiorari, and none of the points raised by Petitioners is worthy of review.

First, the Petition raises no issue of public importance or of general application. In essence, as determined by the Court of Appeals for the Third Circuit, this is a simple case:

> ". . . where two clients retained the same law firm to file suit, and where, later, that law firm chose to represent one of those clients against the other in the course of the same litigation. In view of our evaluation of the situation, we emphasize that it is unnecessary to address the considerable ethical problems that might arise between an attorney named by the court to represent the class and members of the class, or the general problems that might arise when some members of a class favor a settlement and others do not." Pet. App. A at 11a.

Given the factual context of this matter, the Opinion of the Court of Appeals was confined to narrow issues on narrow facts.

Second, no conflict among the Circuits is presented by the Decision of the Court of Appeals, nor is any issue of broad national importance raised by the Petition.

I. The Petition Raises No Issues of Public Importance or of General Application.

Because Petitioners have raised no issue of public importance or general application, the Petition should be denied.

In essence, the Petition expresses the dissatisfaction of a law firm which, to paraphrase the description in the Opinion of the Court of Appeals, was retained by two clients to file suit, and then later chose to represent one client whose interests were in direct conflict with the other client, in the same litigation.

The Petitioners raise a clear question of dual representation which is not difficult to resolve. Simply stated, a law firm cannot simultaneously represent one client who accepts a proposed settlement, while representing another client who opposes the same settlement, and then correct the ill by belatedly withdrawing from one of the two representations, four months *after* objecting to the proposed settlements.

While Petitioners repeatedly state that the law firm's client was "uncomplaining", Petitioners fail to point out the critical fact that its other client moved to disqualify Petitioner from the litigation because of the Petitioner law firm's dual representation. On that Motion, which was joined by each of the plaintiff Respondents herein, the Court of Appeals for the Third Circuit exercised its inherent supervisory powers and determined that the Petitioner law firm, Cochrane & Bresnahan, should be disqualified. See *Matter of Abrams*, 521 F.2d 1094, 1099 (3d Cir.), *cert denied*, 423 U.S. 1038 (1975).

Not only is there an apparent actual conflict, but there is a serious appearance of impropriety in representing clients with adverse interests. *In re Eastern Sugar Antitrust Litigation*, 697 F.2d 524, 530 (3d Cir. 1982). See also, *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3d Cir.), *cert denied*, 429 U.S. 830 (1976); *ABA MODEL RULES OF PROFESSIONAL CONDUCT*, Rule 1.9.

Such a manifest conflict of interest cannot be sanctioned by any Court for the sound reasons set forth in the Opinion of the Third Circuit.

Although Petitioners style the question presented as involving the right of a class representative to object to a settlement, Respondents respectfully submit that there is no such issue before this Court. As described by the Court of Appeals and as set forth above, this case involves a conflict caused by Petitioner law firm's representation at the outset of this litigation of two clients followed by a change of heart as to that representation after the clients adopted conflicting positions with respect to the settlements. There was no challenge raised in any Court below as to the right of a class member to object to a class settlement, nor was that the ground on which the Petitioner law firm's client sought to disqualify Petitioner. The issue before the Court of Appeals for the Third Circuit was simply the duty of individual loyalty counsel owes to a client, as well as the duty owed to the public to avoid even the appearance of impropriety to protect the integrity of our legal system. *In re Eastern Sugar Antitrust Litigation*, supra; *See also, I.B.M. v. Levin*, 579 F.2d 271 (3d Cir. 1978).

II. No Conflict Among The Circuits Is Presented By The Petition.

There is no conflict among the Circuits raised by Petitioners, and accordingly, there is no conflict presented for resolution by this Court. No matter how the issue is

restyled by Petitioners, the unadorned fact is that a law firm is not permitted to switch sides if the representations are substantially related, as they are here, and no Circuit has held to the contrary. See, e.g., *Analytical, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1268 (7th Cir. 1983).

The issues raised by the instant Petition are not related to those in *Richardson-Merrell, Inc. v. Anne Elizabeth Koller, et al.*, No. 84-127, which was argued this term before this Court. The *Richardson* Petition involved substantial questions of wide application, including appealability of disqualification orders under the collateral order exception to the final judgment rule, and a constitutional question as to whether the conduct of the attorneys was protected by the First Amendment. No such far-reaching procedural or constitutional issue is presented in the instant Petition.

CONCLUSION

Petitioners have failed to show any abuse of discretion by the Court of Appeals, or any conflict between the Circuits. Accordingly, for the reasons set forth above, the Petition for Writ of Certiorari should be denied.

DATED: May 15, 1985

Respectfully submitted,

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